

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL C. LYONS,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 244550

Wayne Circuit Court

LC No. 97-000590-01

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted on February 9, 1998, of carrying a concealed weapon, MCL 750.227; possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); possession of marijuana, MCL 333.7403(2)(d); and possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant absconded before sentencing and was subsequently arrested in April 2002. On June 18, 2002, defendant was sentenced to prison terms of one to five years for the CCW conviction, one to four years for the possession of heroin conviction, four months to one year for the possession of marijuana conviction, and two years for the felony firearm conviction. On remand from this Court, the trial court denied defendant's motion for new trial that was based on the claims of ineffective assistance of counsel and newly discovered evidence. Defendant appeals as of right. We affirm.

Defendant first contends that his trial counsel provided ineffective assistance in that she failed to move to suppress the evidence against him. He asserts that evidence seized by police officers after entering Recia Buchanan's home where he lived should have been suppressed as the fruit of an unlawful warrantless entry. He further argues that if his attorney had filed a motion, the evidence discovered as a result of the entry would have been suppressed. In order to prevail, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

The record reveals that during trial officers testified that upon arriving at the door of the home into which defendant ran a woman answered the door and let them in. The testimony was that the entry was consensual, and that they entered without force. Defendant testified at trial that it was he who opened the door to step outside and that the police officers "barged" into the house. Buchanan did not testify at trial. Defendant now argues that because he informed his

counsel of contradictory evidence regarding the officers' entry into the home, trial counsel should have moved to suppress the evidence found in the home as a result of a warrantless entry.

At an evidentiary hearing, defense counsel testified that her recollection of the case was minimal due to the passage of nearly six years. She testified that it was her practice, however, to file a motion to suppress if the facts as presented to her warranted such a motion. She indicated that because she did not file a motion to suppress in this case, the facts as known to her would not support the filing of the motion. She also noted that the police report in this case indicated that it was Buchanan who opened the door and allowed the officers inside. The trial court found defense counsel's testimony to be credible, and found the testimony of defendant and Buchanan regarding the officer's entry into the house not to be credible.

Defendant's argument is premised merely on the fact that his version of the officers' entry into the home differed from the officers' version of their entry into the home. Defendant's argument rests on a credibility determination. In light of the fact that defense counsel testified that she would have filed a motion to suppress if she thought such a motion was warranted by the facts, and in light of the fact that the trial court found defendant's and Buchanan's testimony at the hearing on remand to not be credible, we cannot conclude that defense counsel's performance was objectively unreasonable in light of prevailing professional norms or that a different outcome would have resulted had defense counsel filed a motion to suppress.¹ Thus, defendant's claim of ineffective counsel is without merit.

Defendant also argues that the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence that his cousin, Mark Lee, made a statement in July 2003 corroborating defendant's testimony that it was Mark Lee, and not defendant, who ran from the police and entered defendant's residence. This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). A mere difference in judicial opinion does not establish an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court's factual findings are reviewed for clear error. MCR 2.613(C).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. *Cress*, *supra* at 692.

The trial court found that:

[T]he identity of Mark Lee is not newly discovered evidence. Testimony that Mark Lee ran into the house immediately before the police arrived was presented at trial. Lee lived four doors down from Ms. Buchanan-Lyons (or

¹ Defense counsel's inability to remember the specific facts of this case is a direct consequence of the fact that defendant absconded before sentencing and was sentenced four years after his conviction.

across the street as Lyons said) and was Lyons' cousin. The Court specifically addressed the issue of Lee in its findings of fact. This evidence is simply not newly discovered.

Here, defendant's defense was mistaken identity and he maintained that Lee was the suspect that the police were pursuing. We find no clear error in the trial court's finding that Lee's alleged involvement in this matter clearly was known to defendant before trial and no abuse of discretion in the court's determination that the evidence is not newly discovered evidence.²

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey

²Further, it is unlikely that the statement would make a different result probable on retrial. Neither defendant nor Buchanan informed the police upon their entry into the home and upon defendant's arrest that Lee was the person the police were seeking and that Lee was upstairs. Additionally, the police testified that they never lost sight of the suspect from the time the suspect dropped the weapon until the time the suspect entered the house, that they were certain that defendant was the person they were chasing, and that defendant's shoes were muddy.